IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 20, 2005 Session

STATE OF TENNESSEE v. CLAY B. SULLIVAN

Direct Appeal from the Criminal Court for Davidson County
No. 2001-D-2236 Cheryl Blackburn, Judge

No. M2004-03068-CCA-R3-CD - Filed March 10, 2006

The defendant, Clay B. Sullivan, was convicted by a Davidson County jury of especially aggravated robbery (a Class A felony); attempted second degree murder (a Class B felony); and facilitation of attempted voluntary manslaughter (a Class E felony). He received concurrent sentences of twenty-two years, ten years, and two years for the offenses, respectively, for a total effective sentence of twenty-two years. Upon subsequent motion, the defendant's twenty-two-year sentence was reduced to twenty years, based upon the Supreme Court's holding in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The defendant now appeals to this court, challenging the sufficiency of the evidence, the trial court's denial of the motion for acquittal, and its failure to apply mitigating factors in sentencing. Additionally, the State requests that the original sentence be reinstated pursuant to our supreme court's holding in State v. Gomez, 163 S.W.3d 632 (Tenn. 2005). Upon thorough review, we affirm the convictions and reinstate the original sentence imposed for especially aggravated robbery.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed as Modified

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Charles E. Walker, Nashville, Tennessee, for the appellant, Clay B. Sullivan.

Paul G. Summers, Attorney General and Reporter; Seth P. Kestner, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and James H. Todd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts

This case involves the arrangement of a sham drug deal intended to result in the robbery and murder of Jeremy Dotson. Richard Bagby, a co-defendant charged in the case, testified that while at a party at the defendant's house on the evening of January 8, 2000, the defendant, Joel Teal, Lindsay Dachel, and Maurice Jackson voiced an interest in obtaining marijuana. Because no one had money to pay for the drugs, Dachel suggested that they call Jeremy Dotson to set up a drug deal and rob him. Dachel informed the group that if the plan was carried out, they would have to kill Dotson because he was a co-worker and would recognize Dachel.

After paging Dotson to set up a meeting with him, Teal, Jackson, and Dachel left armed with two sawed-off shotguns but returned unsuccessful one hour later after Teal recognized one of the individuals with Dotson and was unable to follow through. After "regrouping," Dachel again paged Dotson and set up a second meeting with him at the Waffle House on Bell Road. Thereafter, the defendant retrieved his mother's black nine-millimeter handgun and instructed Jackson to wipe the bullet casings off to remove any fingerprints. The defendant further informed Bagby that if he "pulled it off," he would become a member of their gang, dubbed "G.D."

Between 11:00 and 11:30 p.m., the defendant drove Bagby, Jackson, and Dachel to the arranged site, and the group decided that Jackson would be the gunman. Bagby particularly recalled that the defendant stated that the proceeds from the robbery would go to the gang. When they arrived at the Waffle House, Dachel spoke with Dotson, and they decided to move the deal to Dotson's apartment complex, a more secluded area. After following Dotson to Arbor Ridge Apartments, Jackson and Bagby got out of the vehicle with Bagby carrying a duffle bag full of towels, or "woo," for the purpose of imitating money used for the drug deal. When Dotson realized there were only towels in the bag, Jackson shot him and his passenger, Nathaneal Shearon.[1] Jackson and Bagby took five pounds of marijuana from Dotson's truck, and the defendant drove the group back to his house to divide the drugs.

On cross-examination, Bagby acknowledged that he was indicted in the case and had not yet been tried. He further indicated that he had only known the defendant a few days and that he had been to the defendant's house once before the night of the incident. He stated that there were six or seven people at the defendant's party, including two girls who were not involved in the incident. Bagby stated that he smoked some marijuana and drank several Zimas, a malt liquor beverage, while at the defendant's house. On redirect examination, Bagby testified that the defendant did not go on the first trip to meet Dotson and did not get out of the car to talk to him at Waffle House. On recross-examination, he stated that the car did not belong to the defendant but had been rented by Teal.

[1] The record reflects that Nathaneal Shearon was the victim of facilitation of attempted voluntary manslaughter, while Jeremy Dotson was the victim of attempted second degree murder and especially aggravated robbery.

Jeremy Dotson testified that Dachel called him on two occasions to set up a purchase of marijuana. He stated that on the first trip, between 8:00 and 9:00 p.m., there was no transaction because Dachel did not trust that he had five pounds of marijuana. Dotson further stated that Shearon accompanied him to the second meeting at Waffle House on Bell Road, where he and Dachel decided that the area was too crowded and opted to move the transaction to his apartment.

Dotson testified that the defendant drove the other three men to the apartment complex, where Jackson and Bagby exited the vehicle and approached. He stated that Jackson told him he was "dead" and shot him in the left shoulder with a nine-millimeter handgun. Dotson immediately jumped under his truck and "played [] dead," watching Jackson and Bagby take five pounds of marijuana, with a street value of between $4200 and $4300. As they left, Dotson ran toward his apartment and saw the defendant driving away. After searching for Shearon in the apartment, Dotson found him outside lying on the ground with two gunshot wounds to the abdomen.

Dotson testified that the shot to his shoulder ricocheted off of the bone and left a two-inch scar. He stated that he was treated at Vanderbilt Hospital; that he had to take pain pills immediately after the shooting; and that he continues to have pain if he "sleep[s] on it wrong." Dotson further noted that his arm was in a sling for some time and that he was unable to work for approximately three weeks. On cross-examination, Dotson testified that this was the only instance in which he has been involved in this type of transaction. He further acknowledged that he was not prosecuted for selling marijuana, and that he only observed the defendant driving the car.

Nathaneal Shearon testified that he went to a party at Dotson's home around 10:00 p.m. after leaving the Tennessee Titans "Music City Miracle" playoff game. At approximately 11:15 p.m., Dotson asked if anyone wanted to go to the Waffle House on Bell Road, and Shearon volunteered because he was hungry and ready to go home. While walking to the truck, Shearon learned that Dotson would be delivering marijuana to Dachel and accompanied him "kind of against [his] better judgment." As the two ordered food at the restaurant, the defendant drove up with Dachel, Jackson, and Bagby as passengers. After speaking with Dachel outside, Dotson came back into the restaurant and told Shearon that they would have to go back to the apartment.

Upon arrival at the complex, Dotson instructed Shearon to get out of the truck with him as Jackson and Bagby approached. After a brief conversation, Jackson told Shearon that he was "a goner" and shot him twice in the abdomen. Shortly thereafter, Dotson, who had also been shot, found Shearon lying on the ground and told him that the police and paramedics had been called.

Shearon testified that he has a twelve-inch scar on his abdomen and that two bullets remain in his body. He indicated that he was able to pick Jackson out of a photo line-up and that he was "pretty sure" that he was shot with a black nine-millimeter handgun. On cross-examination, Shearon testified that he did not participate in the sale in any way. He stated that the parking lot was "pretty well lit" and that he only saw the defendant driving the vehicle. He further acknowledged that he was neither prosecuted nor called to testify on the drug charges.

Officer Michael Sanders testified that he responded to the scene and found Shearon lying on the ground near Building Sixteen with two gunshot wounds to the abdomen. On cross-examination, Officer Sanders testified that there was a second victim at the complex and that he requested medical attention for both victims. Upon a search of the area, he found a small package and several spent shell casings on the ground next to a silver truck. Detective William Stewart, the lead detective in the case, testified that Shearon was able to positively identify Jackson as the shooter from a photo lineup. Detective Joe Williams testified that he found shell casings on the scene and a tan plastic bag taped underneath the passenger side of Dotson's truck. On cross-examination, he acknowledged that he did not examine the contents of the package but speculated that it could have contained marijuana, cocaine, or "a number of things."

James Rottmund, supervisor of forensics and firearms for the Nashville Metro Police Department, was qualified as an expert in the field of firearms identification. He stated that an analysis of the pattern of scratches on the shell casings can determine whether they were fired from the same weapon. He further stated that he examined the seven nine-millimeter casings that were recovered from the scene and determined that all seven were discharged from the same gun. Following the presentation of proof, the defendant was convicted of facilitation of attempted voluntary manslaughter, attempted second degree murder, and especially aggravated robbery.

Analysis

I. Sufficiency - Facilitation of Attempted Voluntary Manslaughter

The defendant first contends that the State failed to prove that Jackson knew Shearon; that he was adequately provoked; and that he acted "in a state of passion." When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Brewer, 932 S.W.2d 1, 18 (Tenn. Crim. App. 1996).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the State the strongest legitimate view of the evidence contained in the record, as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Elkins, 102 S.W.3d 578, 581 (Tenn. 2003).

The trier of fact, not this court, resolves questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence. Id. In State v. Grace, the Tennessee Supreme Court stated that "[a] guilty verdict by the jury,

approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." 493 S.W.2d 474, 476 (Tenn. 1973).

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

Voluntary manslaughter is defined in Tennessee Code Annotated section 39-13-211 as "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Moreover, the inchoate offense of attempt is codified at Tennessee Code Annotated section 39-21-101 and states

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Finally, one is "criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." T.C.A. § 39-11-403.

The defendant first contends that the evidence was insufficient in that the State failed to prove that the gunman, Jackson, knew the victim, Shearon. "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." T.C.A. § 39-11-302(b). Nothing in the definition of "knowingly" supports the assertion that a defendant must know his victim personally to satisfy the definition of attempted voluntary manslaughter. As such, this issue is without merit.

In the balance of this issue, the defendant contends that the State failed to prove that Jackson was adequately provoked and that he acted "in a state of passion." With respect to Count One, the defendant was indicted for attempted first degree murder but was convicted of the lesser included offense of facilitation of attempted voluntary manslaughter. Although the evidence was legally sufficient to support the indicted offense, we struggle to find proof to support a jury finding of passion produced by adequate provocation, a requisite element of attempted voluntary manslaughter.

This very issue was presented in State v. Davis, 751 S.W.2d 167 (Tenn. Crim. App. 1988), and the analysis employed in that case is instructive. In Davis, the defendant was indicted for first degree murder but was convicted of voluntary manslaughter. In reliance upon our supreme court's decision in State v. Mellons, 557 S.W.2d 497 (Tenn. 1977), the Davis court held that the defendant's conviction should stand despite the absence of proof that the crime was committed on "a sudden heat":

> On appeal, a conviction of a lesser degree of the crime charged, or of a lesser included offense, will be upheld, even if there is no evidence in the record to establish the technical elements of that crime, if the evidence demands a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal of the greater crime, or if there is, the verdict of the jury clearly indicates that the evidence in support of acquittal was disbelieved, on the theory that the defendant was not prejudiced by the charge and the resulting verdict. *See Reagan v. State*, 155 Tenn. 397, 293 S.W. 755 (1927); *Craig v. State*, 524 S.W.2d 504 (Tenn.Cr.App. 1975); *Howard v. State*, 506 S.W.2d 951 (Tenn.Cr.App. 1973), *See also* 102 A.L.R. 1019, 1026; 4 WHARTON'S CRIMINAL PROCEDURE § 545 at 29-30 (12th ed. Torcia 1976).

Davis, 751 S.W.2d at 170 (quoting Mellons, 557 S.W.2d at 499).

In our view, the evidence was sufficient to convict the defendant of the indicted offense (attempted first degree murder), and no evidence was presented to support acquittal on that charge. Attempted first degree murder is defined as the attempt to commit a premeditated and intentional killing of another. See T.C.A. § 39-13-202(a)(1). At the close of the State's proof, the defendant made a motion for judgment of acquittal with respect to all three indicted offenses. In denying the motion, the trial court noted that the State established Jackson's intent to kill when Shearon testified that Jackson stated that he was a "goner" and when Dotson testified that Jackson told him he was "dead" before shooting. The defendant did not present any proof in rebuttal at trial. For these reasons, we conclude that the evidence would have supported a conviction of criminal responsibility for attempted first degree murder and that no evidence was presented to support acquittal of that charge.

Furthermore, it appears that the defendant's strategy at trial was to attenuate his role in the offense such that he would not be found criminally responsible for it; however, the jury implicitly rejected his theory by convicting him of a lesser included offense. This result certainly did not prejudice the defendant in any way as the conviction offense was far less serious than that which the evidence supported. Accordingly, pursuant to the holding in Davis, the conviction for facilitation of attempted voluntary manslaughter is affirmed.

II. Sufficiency - Attempted Second Degree Murder and Especially Aggravated Robbery[2]

Next, the defendant alleges that the corroborating evidence provided by victim Dotson was insufficient to sustain his convictions for second degree murder and especially aggravated robbery. In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice. State v. Bane, 57 S.W.3d 411, 419 (Tenn. 2001); State v. Allen, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). Furthermore, accomplices cannot corroborate one another. State v. Boxley, 76 S.W.3d 381, 386 (Tenn. Crim. App. 2001). In order to qualify as corroborative evidence:

> [t]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity.

State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994) (citations omitted).

The corroborative evidence may be direct or circumstantial and is not required to be sufficient, standing alone, to support a conviction. Id. The corroborative evidence is sufficient if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001). In addition, corroboration is sufficient even though the evidence is slight and entitled, when standing alone, to but little consideration. State v. Heflin, 15 S.W.3d 519, 524 (Tenn. Crim. App. 1999). The corroboration need not extend to all portions of the accomplice's evidence. Bigbee, 885 S.W.2d at 803. The sufficiency of the corroboration is a determination for the jury. Shaw, 37 S.W.3d at 903.

Taking the convictions in order, second degree murder is defined in pertinent part as "[a] knowing killing of another." T.C.A. § 39-13-201(a)(1). Moreover, criminal attempt is codified at Tennessee Code Annotated section 39-21-101 and states:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

---

[2] The defendant was convicted of both attempted second degree murder and especially aggravated robbery based upon the theory of criminal responsibility:

> A person is criminally responsible for an offense committed by the conduct of another if:
>
> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
>
> (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

T.C.A.§ 39-11-402.

(1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A.§ 39-12-101(a).

At trial, Bagby testified that the defendant actively participated in the planning of and preparation for the crime by procuring his mother's nine-millimeter handgun, by instructing Jackson to wipe the fingerprints from the shell casings, and by announcing that their gang, G.D., should receive the proceeds from the crime. Additionally, Dotson corroborated Bagby's testimony that the defendant drove Teal's rental car to and from the crime scene.

On appeal, the defendant contends that the evidence is insufficient because the only testimony corroborated by Dotson related to the defendant driving the vehicle. He claims that because this is "the only evidence against [the defendant]," the evidence is insufficient to support his conviction for criminal responsibility for attempted second degree murder. However, as we have previously noted, the corroboration evidence may be "slight," and is not required to extend to each portion of the co-defendant's testimony. See Bigbee, 885 S.W.2d at 803; Heflin, 15 S.W.3d at 524. In the present case, Dotson's testimony that the defendant transported Babgy and Jackson to and from the crime scene was certainly sufficient to "fairly and legitimately . . . connect the defendant with the commission of the crime charged." Shaw, 37 S.W.3d at 903.

Moreover the corroborated evidence, taken together with the remainder of Bagby's testimony, supports the conclusion that the defendant was criminally responsible for attempted second degree murder. Taken in a light most favorable to the State, the evidence established that the defendant provided the weapon used in the crime, transported the principles, and benefitted from the crime by receiving a portion of the marijuana that was taken from Dotson as a result of the offense. See T.C.A. § 39-11-402(b). Therefore, we conclude that the evidence was sufficient to convict the defendant of criminal responsibility for attempted second degree murder.

A robbery is especially aggravated when it is accomplished by use of a deadly weapon and the victim suffers serious bodily injury. T.C.A. § 39-13-403(a). Serious bodily injury is defined as "bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty." T.C.A. § 39-11-106(a)(34).

On appeal, the defendant contends that the corroboration evidence was insufficient to support his conviction for especially aggravated robbery. However, co-defendant Bagby's testimony demonstrated that the defendant played a vital role in the commission of the offense by assisting at every phase. Further, Dotson's corroborative testimony implicated the defendant in the commission of the offense by virtue of his transportation of Jackson and Bagby. For these reasons, we conclude that Bagby's testimony was sufficiently corroborated to sustain his conviction for especially aggravated robbery.

The defendant also contends that the State failed to prove that Dotson sustained a serious bodily injury as defined in Tennessee Code Annotated section 39-11-106(a)(34). At trial, Dotson testified that the bullet struck his shoulder and ricocheted off of the bone. He further stated that he was treated at Vanderbilt Hospital and that the wound, which left a two-inch scar, required pain medication and a sling. Dotson further noted that he was out of work for three weeks and that he continues to have pain if he "sleep[s] on it wrong."

We initially note that a gunshot wound to the upper torso of the body, almost without fail, constitutes a substantial risk of death given the number of vital organs in that region of the body. Moreover, the undisputed two-inch scar was sufficient for the jury to find protracted and obvious disfigurement. Therefore, we conclude that the evidence was sufficient for the jury to determine that Dotson suffered serious bodily injury. See State v. Mario Merritt, No. W2003-02868-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 1055 (Tenn. Crim. App., at Jackson, Nov. 30, 2004), app. denied (Tenn. Feb. 28, 2005) (holding that a gunshot wound to the shoulder requiring medical treatment, leaving a scar, and continuing to cause intermittent pain was a serious bodily injury)).

III. Denial of Motion for Judgment of Acquittal

The defendant also challenges the trial court's denial of his motion for judgment of acquittal. Rule 29(a) of the Tennessee Rules of Criminal Procedure provides that a "court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." The standard by which the trial court determines a motion for judgment of acquittal is, essentially, the same standard applied by this court in "determining the sufficiency of the evidence after a conviction; that is, whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Gillon, 15 S.W.3d 492, 496 (Tenn. Crim. App. 1997) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979)). Under this standard, the trial court must afford the State the strongest legitimate view of the evidence, as well as all reasonable and legitimate inferences which may be drawn from the evidence. See id.

A motion for judgment of acquittal presents a question of law. State v. Adams, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995); State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The trial court must only determine if the evidence is legally sufficient to sustain a conviction. Adams, 916 S.W.2d at 473. "The trial court is not permitted to weigh the evidence in reaching its

determination." Id. "An appellate court must apply the same standard as a trial court when resolving issues predicated upon the grant or denial of a motion for judgment of acquittal." Id. at 473.

At the close of the State's proof,[3] the defendant made a motion for judgment of acquittal as to the indicted charges of two counts of attempted first degree premeditated murder and one count of especially aggravated robbery. Attempted first degree murder is defined as the attempt to commit a premeditated and intentional killing of another. See T.C.A. § 39-13-202(a)(1). Premeditation necessitates "a previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn. 1992) (citations omitted), and "an act done after the exercise of reflection and judgment . . . [meaning] that the intent to kill must have been formed prior to the act itself." T.C.A. § 39-13-202(d). As we have noted, especially aggravated robbery is perpetrated with a deadly weapon and results in serious bodily injury to the victim. T.C.A. § 39-13-403(a).

In denying the motion, the trial court noted that "Jackson said, You're dead, to [Dotson], and You are a goner, to [Shearon], which indicated a clear intent to kill them." Regarding the charge of especially aggravated robbery, the trial court found clear evidence of a robbery and use of a deadly weapon. The court further noted that while the determination of serious bodily injury was "close," it was a question for the jury. Upon review, we agree that the State presented sufficient evidence for a rational juror to convict the defendant of two counts of attempted first degree murder and one count of especially aggravated robbery. Therefore, we conclude that the trial court did not err in denying the defendant's motion for judgment of acquittal.

IV. Sentencing

In his final issue, the defendant challenges the trial court's rejection of the mitigating factors offered by him. "When reviewing sentencing issues . . ., the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the presentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." Ashby, 823 S.W.2d at 169.

[3] Because the defendant did not present any proof, this issue is not waived. State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998).

As to Count One, facilitation of attempted voluntary manslaughter, the trial court began with the presumptive minimum Range I sentence of one year and enhanced it to two years based upon the application of the following enhancement factors: (2), the defendant's previous criminal convictions or criminal behavior; (3), that the defendant was a leader in the commission of an offense involving two (2) or more criminal actors; (7), that the personal injuries inflicted upon the victim was particularly great; and (10), that the defendant possessed or employed a firearm during the commission of the offense. See T.C.A. § 40-35-114(2), -(3), -(7), -(10).

Count Two, attempted second degree murder, carried a Range I penalty of between eight and twelve years. Beginning with the presumptive minimum sentence of eight years, the trial court enhanced the sentence to ten years based upon the application of enhancement factors (2), (3), and (10). Regarding Count Three, especially aggravated robbery, the trial court began with the presumptive minimum Range I sentence of twenty years and enhanced it to twenty-two years, based upon the application of enhancement factors (2) and (3). The sentences were ordered concurrent as the State did not request consecutive sentencing.

Additionally, the trial court denied application of the following mitigating factors to each offense: (4), the defendant played a minor role in the commission of the offense; (6), the defendant, because of youth, lacked substantial judgment in committing the offense; (8), the defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense. See T.C.A. § 40-35-113(4), -(6), -(8).

In a supplemental motion to the defendant's motion for new trial, the defendant challenged the twenty-two year sentence imposed on Count Three (especially aggravated robbery) based upon the Supreme Court's holding in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). In response, the trial court withdrew application of enhancement factors (3) and (7), but factors (2), the defendant's prior convictions, and (10), the use of a firearm, remained intact. As a result, the sentence in Count Three was reduced from twenty-two years to the presumptive minimum of twenty years.

On appeal, the defendant challenges the trial court's failure to apply the requested mitigating factors. In its brief, the State asserts that the original sentence should be reinstated based upon our supreme court's decision in State v. Gomez, 163 S.W.3d 632 (Tenn. 2005), which held that our sentencing procedure does not violate the Sixth Amendment right to trial by jury as described in Blakely. Upon review, we conclude that the trial court considered all applicable sentencing principles and the appropriate facts and circumstances, entitling its findings to a presumption of correctness. Moreover, the court discussed all requested mitigating factors and supported its reasoning for denying application of them:

> Looking at mitigating factors, those outlined by the defendant are that he played a minor role in the commission of the offense by virtue of the fact that I found him to be a leader, I find that does not apply.
>
> Factor number 6, mitigating factor number 6, because of his youth or old age lacked substantial judgment in committing the offense. He is 19 years old. There is

> absolutely no proof that he didn't understand what was going on; as a matter of fact, the proof is to the contrary, so I'm not going to find that factor.
>
> He was suffering from a mental or physical condition that significantly reduced his culpability for the offense. Actually, I don't find any proof in the record for that at all, so, but I've looked at all of them.

Therefore, we conclude that the trial court did not err in failing to apply the mitigating factors recommended by the defendant. Finally, because our supreme court has held that Blakely does not impact our sentencing scheme, we reinstate the defendant's original sentence of twenty-two years for especially aggravated robbery.

Conclusion

We affirm the convictions and reinstate the original sentence of twenty-two years on the conviction of especially aggravated robbery.

_____

JOHN EVERETT WILLIAMS, JUDGE